92-1051

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE STATE OF TEXAS, ***Petitioner***

vs.

JESUS MARTINEZ, ***Respondent***

Petition for Writ of Certiorari to the Court of Appeals for the Second Court of Appeals District of Texas

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APP

QUESTION PRESENTED

Whether Texas courts have misconstrued *Hernandez v. New York* by engrafting onto the second prong of the *Batson v. Kentucky* analysis a definition of the term "legitimate reason" which requires that the non-racial reason for the exercise of the peremptory challenge be one that " . . . a **rational** prosecutor might in good faith wish to use as a peremptory challenge." This definition is constitutionally more onerous than the burden mandated by this Court, a race-neutral explanation for the State's exercise of its peremptory challenge.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

The pertinent voir dire evidence 4

The opinion below 5

REASONS FOR GRANTING THE WRIT 9

I. THE COURT OF APPEALS ERRED IN HOLDING THAT FOR A PEREMPTORY STRIKE TO PASS EQUAL PROTECTION MUSTER, THE PROSECUTOR MUST COME FORWARD WITH A REASON WHICH IS NOT ONLY RACE-NEUTRAL BUT IS ALSO A REASON "THAT A RATIONAL PROSECUTOR MIGHT IN GOOD FAITH WISH TO USE AS A PEREMPTORY CHALLENGE," IN DIRECT CONFLICT WITH *BATSON V. KENTUCKY* AND *HERNANDEZ V. NEW YORK* 9

A. The conflict with this Court's decisions 9

B. The Court of Appeals failed to give due deference .. 14

C. The decision of the Texas court is in conflict with decisions of the United States Courts of Appeals 18

II. THE CHALLENGED TEXAS DECISION IS NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND 20

CONCLUSION 21

APPENDIX

Opinion of Court of Appeals A-1

Orders refusing discretionary review and denying rehearing in Court of Criminal Appeals A-8

Excerpts from State's petition for discretionary review A-9

State's motion for rehearing following refusal of its petition for review A-11

Order granting State's motion for stay of mandate in Court of Appeals A-20

TABLE OF AUTHORITIES

Cases : *Page*

Anderson v. Bessemer City, 470 U. S. 564,
105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) 15,16

Batson v. Kentucky, 476 U.S. 79,
106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) . . . . . .passim

Draughon v. State, 831 S.W.2d 331
(Tex.Crim.App. 1992) 11n

Hernandez v. New York, 500 U.S. __,
111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) . . . . . passim

Hill v. State, 827 S.W.2d 860
(Tex.Crim.App. 1992) 21

Keeton v. State, 749 S.W.2d 861
(Tex.Crim.App. 1988) 17n.7

Lewis v. United States, 146 U.S. 370,
13 S.Ct. 136, 36 L.Ed. 1011 (1892) 11

Martinez v. State, 824 S.W.2d 724
(Tex.App.- Fort Worth 1992) 1,6,7,13,18

McDonnell Douglas Corp. v. Green, 411 U.S. 792,
93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) 12

Michigan v. Long, 463 U.S. 1032,
103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 20,21

Montana v. Hall, 481 U.S. 400,
107 S.Ct. 1825, 95 L.Ed.2d 354 (1987) 20

Powers v. Ohio, 499 U.S. __, 111 S.Ct. 1364,
113 L.Ed.2d 411 (1991) 10

State v. Antwine, 743 S.W.2d 51
(Mo. 1987) 20n

State v. Oliver, 808 S.W.2d 492
(Tex.Crim.App. 1991) 5n

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248, 101 S.Ct. 1089,
67 L.Ed.2d 207 (1981) 12,13

Texas v. Brown, 460 U.S. 730,
103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) 20

United States v. Alvarado, 951 F.2d 22
(2nd Cir. 1991) 20

United States v. Clemons, 941 F.2d 321
(5th Cir. 1991) 19,20

United States v. United States Gypsum Co.,
333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948) 16

United States v. Williams, 934 F.2d 847
(7th Cir. 1991) 19

Whitsey v. State, 796 S.W.2d 707
(Tex.Crim.App. 1989) (opinion on rehearing) . .6,7,16n,17n,21

Williams v. Chrans, 957 F.2d 487
(7th Cir. 1992) 18,19

Williams v. State, 804 S.W.2d 95
(Tex.Crim.App. 1991), *cert. denied,*
111 S.Ct. 2875 . . . . . 5,6,17n,21

Young v. State, 826 S.W.2d 141
(Tex.Crim.App. 1991) 8,8n

Constitutional and statutory provisions:

Tex. Code Crim. Proc. Ann. art. 35.261, Tex. Laws 1987,
ch. 751, § 1, at 2685 . . . . . 3,5n

Tex. Rev. Civ. Stat. Ann. art. 6701*l*-1
(Vernon Supp. 1991) 2

28 U.S.C. §1257 (a) 2

U.S. Constitution, Fourteenth Amendment 2

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

THE STATE OF TEXAS, ***Petitioner***

vs.

JESUS MARTINEZ, ***Respondent***

_____

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Court of Appeals District of Texas.

OPINION BELOW

The opinion of the Court of Appeals has been reported for publication as *Martinez v. State,* 824 S.W.2d 724 (Tex.App.- Fort Worth 1992). It is reproduced in the appendix at A-1.

JURISDICTION

The Court of Appeals issued its opinion and judgment on February 5, 1992. The State did not file a motion for rehearing in the Court of Appeals. The State timely filed a petition for discretionary review on March 13, 1992. The Court of Criminal Appeals of Texas refused the petition on May 20, 1992. The State timely filed a motion for rehearing in the Court of Criminal Appeals on June 4, 1992, which was overruled on September 23, 1992. On November 5, 1992, the Court of Appeals granted the State's motion to stay the mandate. Jurisdiction in this Court is invoked under 28 U.S.C. §1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Rev. Civ. Stat. Ann. art. 6701*l*-1 (Vernon Supp. 1991), in pertinent part:

> (a) In this article:
>
> . . . .
>
> (2) "Intoxicated" means:
>
> (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of

> two or more of those substances into the body; or
>
> (B) having an alcohol concentration of 0.10 or more.
>
> . . . .
>
> (b) a person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place. The fact that any person charged with a violation of this section is or has been entitled to use a controlled substance or drug under the laws of this state is not a defense.

Tex. Laws 1987, ch. 751, §1, at 2685, Tex. Code Crim. Proc. Ann. 1987, art. 35.261, in pertinent part:

> (a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that the challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

STATEMENT OF THE CASE

Jesus Martinez, the Respondent, was convicted of driving while intoxicated. During the voir dire examination, the State exercised a peremptory challenge on a Hispanic venireperson on the basis of his attitudes towards intoxication in general and his specific views on the intoxilyzer test. Purporting to apply the analysis for evaluating claims that the prosecutor's peremptory strikes were racially motivated set out in *Hernandez v. New York*, 500 U.S. ____, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court of Appeals enlarged the burden of the prosecution by ruling that the race-neutral explanation proffered must objectively be one that a rational prosecutor, in good faith, might wish to use as a peremptory challenge. The Court of Appeals then held that the trial court's conclusion in this case that the peremptory challenge was not racially motivated was clearly erroneous, as it was not supported by the record.

The pertinent voir dire evidence

The prosecutor gave two reasons for expending a peremptory challenge on a Hispanic venireperson, Mr. Hernandez: 1) his attitude toward intoxication in general; and 2) his specific views on the intoxilyzer test (R. II. 60-61).

The voir dire shows that defense counsel questioned Mr. Hernandez about his views on intoxication (R. II. 47). Defense counsel first explained that "intoxication" was present "only if you have enough drinks during a given time period to raise your blood alcohol content to a level of intoxication or so that you lose or so that you don't have the normal use of your physical or mental faculties." Then, defense counsel asked:

> So I guess Mr. Hernandez, does that make sense to you that you can have a drink or several drinks, get in a car and drive and not commit a crime?
>
> THE VENIREMAN: Yes, I understand what you're saying. (R. II. 47).

In addition, the record reflects that later in the voir dire, also in response to defense questioning, a venireman expressed specific doubts about the validity of the intoxilyzer test:

[DEFENSE COUNSEL]: . . . I think the state [sic] asked you, do any of you have any independent knowledge of the intoxilyzer machine, used one, taken one, had your buddies tell you about one, had your cousin, the police officer in Dallas tell you about it?

THE VENIREMAN: Oh, yeah, all the time.

[DEFENSE COUNSEL]: Does he believe in them?

THE VENIREMAN: He says he believes more in the blood test than breathlalizer [sic] test. (R. II. 49).[1]

The opinion below

On appeal, the Respondent argued, *inter alia*, that the State had impermissibly excluded venireperson Hernandez in violation of the dictates of this Court's holding in *Batson v. Kentucky* and *Hernandez v. New York* and the Texas cases interpreting those decisions.[2] Appellant's brief, p. 5-8. The Court of Appeals set out the following standard for judging that claim:

> As part of our analysis of whether the trial court's findings are clearly erroneous, we may consider whether the findings are supported by the record. *Williams*, 804 S.W.2d at 101.

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[1] This response was largely the basis upon which the prosecutor chose to peremptorily strike Mr. Hernandez. Although the record did not affirmatively indicate that venireperson Hernandez was the unidentified venireperson who responded to the questions about the intoxilyzer, the trial court resolved that doubt in favor of the State. Since the trial court was in a position to know whether a venireperson other than Mr. Hernandez was the individual who made that response, the State takes the position that the trial court, in denying Respondent's *Batson* motion, resolved any doubt in favor of the State. (R. II. 60-61).

[2] In addition to invoking the Texas cases interpreting the *Batson and Hernandez* decisions, Appellant invoked **Tex.Code Crim.Proc.Ann. 1987, art. 35.261**, which is the Texas provision that procedurally implements *Batson* and its progeny. *See, State v. Oliver*, 808 S.W.2d 492, 495-496 (Tex.Crim.App. 1991).

We also may consider certain factors, the presence of any one of which tends to show that the State's reasons are not actually supported by the record or are an impermissible pretext. These factors are:

1. The reason given for the peremptory challenge is not related to the facts of the case;
2. There was a lack of questioning to the challenged juror or a lack of meaningful questioning;
3. Disparate treatment - persons with the same or similar characteristics as the challenged juror were not struck;
4. Disparate examination of members of the venire, i.e., questioning a challenged juror so as to evoke a certain response without asking the same question of other panel members; and
5. an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.

Williams v. State, 804 S.W.2d at 106; *Whitsey v. State*, 796 S.W.2d 707, 713-714 (Tex.Crim.App. 1989).

We also note that the prosecutor's reason must be a "legitimate reason." *Batson v. Kentucky*, 476 U.S. 79, 99 n.20, 106 S.Ct. 1712, 1724 n.20, 90 L.Ed.2d 69 (1986); *Whitsey*, 796 S.W.2d at 713. **We understand this to mean that it must be a non-racial reason that a rational prosecutor might in good faith wish to use as a peremptory challenge.**

Martinez v. State, 824 S.W.2d at 726. (emphasis added).

Thus, although the Court of Appeals initially invoked the correct standard of appellate review, that the trial court's *Batson* ruling should be upheld unless clearly erroneous, it then used a

different standard in actually analyzing the record. Rather than viewing the trial court's action in denying the *Batson* motion in the light most favorable to its ruling to see if that decision was supportable, the Court of Appeals decided the issue by focusing on the juror's responses in the least favorable light and then resolving all ambiguity against the trial judge and the prosecutor. As a result, the Court of Appeals first announced, " . . . [t]hat the only views expressed by the veniremember in effect were that the D.W.I. law made sense and he understood it[,]" and then opined that, based on its definition of "legitimate reason," the peremptory challenge could not be validly expended on a venireperson who understood and agreed with the applicable law. *Martinez v. State*, 824 S.W.2d at 726. Similarly, the Court found that Mr. Hernandez was only expressing his cousin's view of the intoxilyzer, not his own, so that nothing he said suggested that he was hostile to the State. *Martinez v. State*, 824 S.W.2d at 727. Since Mr. Hernandez agreed with the applicable law and was not hostile, the Court of Appeals held ". . . the trial court's implied conclusion that the peremptory challenge was not a pretext but was exercised for race-neutral reasons [was] clearly erroneous, because it was not supported by the record." *Id.*

In its brief to the Court of Appeals, the State argued that the Court of Appeals was compelled to sustain the trial judge's decision based upon the prevailing standard of appellate review as announced by this Court:

> In reviewing a trial court's ruling, the appellate court must use the clearly erroneous standard, i.e., the trial judge must be affirmed unless "the reviewing court on the entire evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed." *Hernandez*, 111 S.Ct. at 1871; *Whitsey v. State*, 796 S.W.2d 707, 726 (Tex.Crim.App. 1989). The trial court's decision on the question of purposeful discrimination will be accorded great deference on

> appeal. *Hernandez*, 111 S.Ct. at 1868. "The court of appeals is not to determine whether the prosecutor's explanations are credible, but rather, whether the trial judge's ruling on Appellant's *Batson* motion was supported by the record and therefore not clearly erroneous." *Young v. State*, No. 384-90 (Tex.Crim.App. June 12, 1991) at 9 (not yet published).[3]

State's brief in Court of Appeals, p.7.

In its petition for discretionary review to the Texas Court of Criminal Appeals, the State urged that Court to review the Court of Appeals' decision for three distinct reasons: 1) the Court of Appeals turned the *Batson* decision on its head by viewing the evidence in the light least favorable to the judge's ruling, rather than determining whether the ruling was supported by the evidence; 2) the Court of Appeals defined the term "legitimate reason" so as to expand appellate review beyond the determination of whether the peremptory was race-neutral, in conflict with this Court's opinion in *Hernandez v. New York;* and 3) the Court of Appeals incorrectly required the prosecutor to point out non-verbal actions of the venireperson, notwithstanding the fact that the demeanor of venireperson Hernandez was not a reason for the exercise of the peremptory. State's pet. for review, pp. 2-13 (excerpts in Appendix at A-9). The State's petition was refused. Appendix at A-8.

The State's motion for rehearing following the refusal again raised the conflict between *Hernandez* and the analysis of the Court of Appeals. State's motion for rehearing in the Court of Criminal Appeals, pp.1-11 (Appendix A-11). The motion for rehearing was overruled. Appendix at A-8.

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[3] *Young v. State*, 826 S.W.2d 141, 146-47 (Tex.Crim.App. 1991).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT FOR A PEREMPTORY STRIKE TO PASS EQUAL PROTECTION MUSTER, THE PROSECUTOR MUST COME FORWARD WITH A REASON WHICH IS NOT ONLY RACE-NEUTRAL BUT IS ALSO A REASON "THAT A RATIONAL PROSECUTOR MIGHT IN GOOD FAITH WISH TO USE AS A PEREMPTORY CHALLENGE," IN DIRECT CONFLICT WITH *BATSON V. KENTUCKY* AND *HERNANDEZ V. NEW YORK.*

A. The conflict with this Court's decisions

The opinion of the Court of Appeals establishes a new and erroneous *Batson* standard of appellate review. The Court of Appeals declared that in order to pass muster under *Batson v. Kentucky* and *Hernandez v. New York*, the prosecutor must come forward with a reason for the use of a peremptory challenge which is not only race-neutral but is also a reason "that a *rational* prosecutor might in good faith wish to use as a preemptory challenge." [4]

This more burdensome standard appears to be in direct conflict with this Court's holdings in *Batson* and *Hernandez*. This Court has never declared that it was a requirement of the Equal Protection Clause that the prosecutor's use of a peremptory strike pass the litany of rationality. Equal Protection only dictates that the strike not be racially motivated.

In *Batson v. Kentucky*, this Court outlined a three-step analysis for evaluating claims that a prosecutor had used a peremptory challenge which was racially motivated. *Batson v. Kentucky*, 476 U.S. at 96-98, 106 S.Ct. at 1723-1725. First, the defendant must make a prima facie showing that the prosecutor

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[4] *Martinez v. State*, 824 S.W.2d at 726 (emphasis added).

used his peremptory challenges on the basis of race. Second, if a prima facie showing has been established, the burden shifts to the prosecutor to articulate a race-neutral explanation for peremptorily challenging the jurors in question, and, finally, the trial court must determine whether the defendant carried his burden of proving purposeful racial discrimination. *Id.*

Then, in *Hernandez v. New York*, a plurality of this Court defined the nature of the term "race-neutral explanation" when it wrote:

> A neutral explanation in the context of our analysis [*Batson*] here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the *facial validity* of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. (emphasis added).
> *Hernandez v. New York*, 500 U.S. at ____ , 111 S.Ct. at 1866.

This point was expressed with further clarity by Justice O'Connor in her concurring opinion when she stated:

> Consistent with our established equal protection jurisprudence, a peremptory strike will constitute a *Batson* violation only if the prosecutor struck a juror *because of the juror's race*. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely on account of their race* or on the assumption that [Hispanic] *jurors as a group* will be unable impartially to consider the State's case." *Batson*, 476 U.S., [sic] at 89, 106 S.Ct. at 1719 (emphasis added). See also *Powers v. Ohio*, 499 U.S. __, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenge to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their

race"). *Batson's* requirement of an explanation means an explanation other than race.

* * *

Absent intentional discrimination violative of the Equal Protection Clause, **parties should be free to exercise their peremptory strikes for any reason, or for no reason at all.** The peremptory challenge is, "as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Lewis v. United States,* 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011 (1892) (internal quotations omitted).

* * *

. . . [i]f, as in this case, the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the matter . . . It also does not require that the justification be unrelated to race. *Batson* **requires only that the prosecutor's reason for striking a juror not *be* the juror's race.**

(Emphasis added).

Hernandez v. New York, 500 U.S. at ___, 111 S.Ct. at 1874-75 (Justice O'Connor concurring).

Thus, under *Batson* and *Hernandez,* a prosecutor's justification for the exercise of a State's peremptory may be unusual, idiosyncratic, or irrational, so long as it is not racially motivated.[5]

This rationale is buttressed by the Title VII sex discrimination cases which function as the precursors to the analysis performed in evaluating claims that a prosecutor violated the Equal Protection

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[5] *See, Draughon v. State,* 831 S.W.2d 331, 334 (Tex.Crim.App. 1992) (a party may expend a peremptory challenge for idiosyncratic reasons, so long as the reasons are not racially motivated).

Clause in the exercise of the State's peremptory challenges. *Batson v. Kentucky*, 476 U.S. at 98 n.20, 106 S.Ct. at 1724 n.20. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), this Court set forth the basic allocation of burdens and order of presentation of proof in sex discrimination cases under Title VII. This three-part analysis was eventually adopted in *Batson* and has continued as a viable litmus test in determining racial discrimination by the use of a peremptory challenge: 1) the plaintiff has the burden of proving by a *preponderance of the evidence* a prima facie case of discrimination; 2) the burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection;" and 3) the plaintiff has the burden by a *preponderance of the evidence* to establish that the "legitimate reason" given was nothing more than a pretext of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-803, 93 S.Ct. at 1824.

This Court fully explained the appropriate allocations of burdens as first announced in *McDonnell Douglas* in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). First, the ultimate burden of persuading the trier of fact that the defendant [now the State] intentionally discriminated against the plaintiff remains at all times with the plaintiff. The burden of persuasion "never shifts." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. Second, once the plaintiff has carried his initial burden of establishing a prima facie case, the burden is shifted only to the extent that the defendant is required to articulate a legitimate, nondiscriminatory reason. "The defendant need not *persuade* the court that it was actually motivated by the proffered reasons." *Id.*, 450 U.S. at 254, 101 S.Ct. at 1094. Put simply, to discharge its burden, the defendant is only required to clearly set forth into evidence a nondiscriminatory articulation legally justifying defendant's action. *Id.*, 450 U.S. at 254-55, 101 S.Ct. at 1094. Finally, once the defendant carries this *burden of production*, the

presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to allow the plaintiff the opportunity to demonstrate pretext, with the plaintiff retaining the burden of persuasion. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 255-56, 101 S.Ct. at 1094-1095.

This rationale for the operation of the prima facie burden of proof rules was brought forward to claims of purposeful racial discrimination in exercise of the peremptory challenges in *Batson*. *Batson v. Kentucky*, 476 U.S. at 94-98 n.18-20, 106 S.Ct. at 1721-1724 n.18-20. In the instant case, the Court of Appeals simply misconstrued the nature of the burden that *Batson* and *Hernandez* place on the State once the Respondent has established his prima case of a racially-motivated peremptory strike. As this Court stated in *Hernandez*, once the defendant makes a prima facie showing, the prosecutor is obligated to articulate a race-neutral explanation for striking the juror[s], i.e., " . . . an explanation based upon something other than the race of the juror." *Hernandez v. New York*, 500 U.S. at ____, 111 S.Ct. at 1866. It is plain that the Court of Appeals required much more: it placed on the prosecutor the burden of persuading the court that it had convincing *objective reasons*, albeit non-racial, that a rational prosecutor might in good faith wish to use as a peremptory challenge. *Martinez v. State*, 824 S.W.2d at 726.

Such a concept is antithetical to the holdings of both *Batson* and *Hernandez* that peremptory strikes may be made for any reason, irrational, idiosyncratic, or unwise, so long as they are not racially motivated. In other words, the Court of Appeals has added a new "rationality" test to the *Batson* standard of appellate review, to wit: that in order for a peremptory challenge to be valid, the challenge must appear rational *in the eyes of the appellate court.* This notion is totally contrary to the explicit holding of *Hernandez* and its precursors, which have consistently stated that the defendant's prima facie showing of a discriminatory use of a peremptory is rebutted if the prosecutor articulates a neutral explanation for striking the juror, and such an explanation is

neutral if it is based upon something other than the race of the juror. *Hernandez v. New York*, 500 U.S. at ____, 111 S.Ct. at 1866. *Batson* and its progeny make it clear that the Equal Protection Clause prohibits purposeful racial discrimination in the exercise of peremptory strikes; the Equal Protection Clause does not prohibit irrational, idiosyncratic, unwise, unusual or eccentric strikes, so long as they are *race-neutral*.

The Court of Appeals' opinion, like the record, makes it clear that the prosecutor exercised the peremptory on venireperson Hernandez because of his general attitude toward intoxication and because of his specific view on the intoxilyzer. Rational? Perhaps. Race-neutral? Absolutely. The Respondent had the burden of persuasion to establish that the explanation was a pretext for purposeful discrimination. The record is devoid of such evidence, and the Court of Appeals makes no claim that such evidence exists.

Batson and *Hernandez* do not prohibit the explanation given here, if found credible by the trial court; however, the opinion of the Court of Appeals does. This Court should grant review to strike down the new, higher standard of appellate review established by the Court of Appeals.

B. The Court of Appeals failed to give due deference

By engrafting the requirement that a permissible explanation for the exercise of a peremptory strike must, under *Batson* and *Hernandez*, be one which a "rational prosecutor" could rely on, the Court of Appeals converted the ultimate *Batson* test into an appellate "rationality" standard of review. Indeed, while rationality of the strikes might be a factor for the trial court, such is not the concern of the appellate court. By focusing on its own view of the rationality of the strike, the Court of Appeals ignored the principle that it was to give due deference to the trial court's determination of non-racial motivation.

In setting out the principles of law to be applied to a claim of discrimination by the use of the peremptory challenge, this Court, in *Batson*, expressly incorporated the standard of appellate review traditionally applied in equal protection cases. As has already been stated, the *Batson* and *Hernandez* courts embraced the rules established for disparate treatment claims under Title VII for the allocation of intermediate burdens of proof and production, reiterating that the "party alleging that he has been the victim of discrimination carries the ultimate burden of persuasion." *Batson v. Kentucky,* 476 U.S. at 94 n.18, 106 S.Ct. at 1721-1722, n.18. More importantly, the Court emphasized that the trial court's findings of fact, including its finding on the issue of the prosecutor's intent, should be entitled to great deference on appeal:

> '[A] finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing ordinarily should give those findings great deference. Id., at 575-576, 105 S.Ct. at 1512-1513.
> *Batson v. Kentucky,* 476 U.S. at 98 n.21, 106 U.S. at 1724 n. 21.

Hernandez v. New York represents an adoption by this Court of a "clear error" standard of review for the appellate analysis of *Batson* claims, whether from federal or state courts. *Hernandez v. New York,* 500 U.S. at ___, 111 S.Ct. at 1869. This standard is the same as the one utilized in disparate treatment and gender discrimination cases, in which due deference is given to the trial court's findings on the issue of invidious discrimination: "[A] finding is 'clearly erroneous' when although there is evidence to

support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. at 573, 105 S.Ct. at 1511, *citing*, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Under this standard, the appellate court is not to conduct a *de novo* review of the factual issues. *Anderson v. Bessemer City*, 470 U.S. at 573, 106 U.S. at 1511. Thus, a lower court such as the Court of Appeals in this case may not reverse, even if it is convinced that it would have weighed the evidence differently if it had been sitting as trier of fact. "Where there are two permisible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Id.*[6] [citations omitted].

Concomitant with the "clearly erroneous" standard of appellate review is the *absolute* concept that it is a deferential standard:

> *Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords without treatment of that issue in other equal protection cases. [citations omitted].*
>
> * * *
>
> Deference to trial (court findings) on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding will 'largely turn on evaluation of credibility.' 476 U.S. at 98 n.21, 106 S.Ct. at 1724, n.21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race neutral explanation for a peremptory challenge should be believed. There will seldom be

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[6] The "clearly erroneous" standard has been fully adopted by the Texas Court of Criminal Appeals. See *Whitsey v. State*, 796 S.W.2d at 720-728 (Tex.Crim.App. 1989) (opinion on rehearing).

> much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' [citations omitted].
> *Hernandez v. New York,* 500 U.S. at ___, 111 S.Ct. at 1869.

The Court of Appeals here failed to honor its obligation under *Batson.*[7] While paying lip service to the deferential nature of the appellate standard, the court concluded that the only interpretation it could give to the venireperson's initial response to the defense counsel's question concerning the D.W.I. law was that the venireperson understood and agreed with the D.W.I. law.[8] The problem with the Court of Appeals' interpretation is that, while it may have been a reasonable one, it was not the only reasonable one. It is equally likely and reasonable that the response meant that the venireperson believed that a person who merely had "one or several drinks" was not necessarily commiting an offense when he drove. As a result, it is certainly within the realm of possibility that the prosecutor legitimately struck him for this view, i.e., his "general views" on intoxication. Similarly, the Court of Appeals

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[7] It is not surprising that the Court of Appeals failed to conduct an appropriate *Batson* analysis. Contributing to the Court of Appeals' misapplication of the "clearly erroneous" standard is a line of cases from the Texas Court of Criminal Appeals that take evidentiary factors which a ***trial*** court may legitimately consider and allow the ***appellate*** courts to make the same use of them. In using these factors on appeal, the courts of appeals have been encouraged to conduct a review *de novo* and undercut the trial court's ruling, rather than view the evidence in the light most favorable to that ruling. *Williams v. State*, 804 S.W.2d 95, 105-106 (Tex.Crim.App. 1991); *Keeton v. State*, 749 S.W.2d 861, 866 (Tex.Crim.App. 1988); *Whitsey v. State*, 796 S.W.2d at 714.

[8] Mr. Hernandez said that he "understood" that a person can "have" a drink or several drinks, get in a car and drive and "not commit a crime." (R.II. 47).

rejected the explanation that the prosecutor also struck Mr. Hernandez because of his specific views on the validity of the intoxilyzer test. The venireperson said that his cousin, a police officer, believed more in the blood test than in the breathalizer, which the Court of Appeals construed as a mere recitation of the ***cousin's*** belief which shed absolutely no light on the ***venireperson's own opinion*** of the validity of blood tests versus breath tests. *Martinez v. State*, 824 S.W.2d at 726. However, it is perfectly logical -- and legitimate -- for a prosecutor to assume that a venireperson who recites another's views when asked for his own views is actually adopting those views, or is at least influenced by them to a substantial degree.

Thus, although the Court of Appeals claims to have applied the "clearly erroneous" standard of review and to have given deference to the trial court's ruling, it did not. Instead of recognizing that there may have been two permissible views relating to the juror's responses, it viewed those responses in the light least favorable to the trial court's rulings and resolved all ambiguity against the trial judge and the prosecutor. This is contrary to the review comtemplated by *Batson* and *Hernandez*.

The Court of Appeals stood the deferential standard of review on its head and gave absolutely no deference to the trial court's ruling. It ignored the unique position of the trial judge in evaluating the demeanor of the attorney exercising the peremptory strike, thereby usurping the trial judge's domain in determining credibility.

C. The decision of the Texas courts is in conflict with decisions of the United States Courts of Appeals.

The Seventh Circuit addressed a question akin to the one presented here in *Williams v. Chrans*, 957 F.2d 487 (7th Cir. 1992). There, the appellant, a gang member, was prosecuted for murder. One of the prospective jurors was peremptorily struck, and the government gave as a race-neutral explanation the fact that

the juror lived in the vicinity of the gang's activities. Appellant claimed this justification was pretextual. While recognizing that the exclusion of black venirepersons simply because of their home or place of work in a gang area could lead to abuse, the court nonetheless sustained the trial court's ruling denying the *Batson* claim. *Id.* at 489-90. Rather than assaying the record for some sort of "rationality," the Court gave due deference to trial court, notwithstanding the state's thin reasons:

> *Batson* requires that the prosecution's reasons be "a neutral explanation related to the particular case to be tried." 476 U.S. at 98, 106 S.Ct. at 1724. The justification for exercising a peremptory challenge, however, does not need to be sufficient to justify a challenge for cause in order to be race-neutral. *Id.* at 97, S.Ct. at 1723. Adequate explanations for exercising a peremptory strike may include a prosecutor's "intuitive assumptions that are not fairly quantifiable." *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991).
>
> The trial court concluded that the prosecutor had provided legitimate, race-neutral, reasons for excluding Mrs. Berry and Mr. Churchill. **We cannot reverse this finding unless the court's determination was clearly erroneous -- even if we find it dubious.** *Hernandez* 111 S.Ct. at 1870.

Williams v. Chrans, 957 F.2d at 490 (emphasis added).

Likewise, in *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991), the Fifth Circuit stated that even if the government's explanations are vague and amorphous, *Hernandez* applies. As long as the explanation is based upon something other than the race of the juror, the explanation is sufficient. The court's " . . .

inquiry should focus on the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason given by the prosecutor will be deemed race-neutral." [citations omitted]. *United States v. Clemons*, 941 F.2d at 325. *See also, United States v. Alvarado*, 951 F.2d 22 (2nd Cir. 1991), in which the Second Circuit states that even if a prosecutor's explanation is doubtful, the issue is to be determined based on the assessment of prosecutorial intent. *Id.* at 26. Thus, these federal circuits have not delved into some "rationality" search; instead, per the holdings of *Batson* and *Hernandez*, they have treated the appellate standard of review as one of deference.[9]

II. THE CHALLENGED TEXAS DECISION IS NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The opinion in Respondent's case and the Court of Criminal Appeals decision from which it draws support "fairly appears to rest primarily on federal law" and the "adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Montana v. Hall*, 481 U.S. 400, 403 n.3, 107 S.Ct. 1825, 1827 n.3, 95 L.Ed.2d 35 (1987); *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). *See also Texas v. Brown*, 460 U.S. 730, 732 n.1, 103 S.Ct. 1535, 1538 n.1, 75 L.Ed.2d 502 (1983).

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[9] Finally, the State would like to point out that at least one state court of last resort is somewhat *consistent* with the Court of Appeals' opinion. The Missouri Supreme Court in *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987), concluded that the prosecutor's explanation had to be more than " . . . facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, *Batson* would be meaningless." *Id.* Thus, at least one other jurisdiction would also inject some type of rational objective standard into the appellate process. With this percolating inconsistency involving *Batson*, this Court should take this opportunity to correct any misperceptions.

In fact, the cases on which the Court of Appeals places reliance are the Court of Criminal Appeals' interpretations of this Court's *Batson* and *Hernandez* decisions. *See Williams v. State*, 804 S.W.2d 95 (Tex.Crim.App. 1991), *cert. denied*, 111 S.Ct. 2875; *Hill v. State*, 827 S.W.2d 860, 865 (Tex.Crim.App. 1992); *Whitsey v. State*, 796 S.W.2d 707 (1989). Indeed, the State can say with confidence that there is no decision concerning the appellate standard of review involving *Batson* claims in which a Texas court has made a "plain statement" under *Michigan v. Long* that the opinion was grounded solely in Texas state law.

Finally, the Court of Appeals' decision reveals a conceptual misunderstanding about federal constitutional law that would permit this Court to exercise its jurisdiction and resolve the federal question. Therefore, this Court has jurisdiction to decide the question presented, and it should exercise that jurisdiction in light of the Court of Appeals' flagrant misconstruction of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Had the Court of Appeals assayed the Respondent's *Batson* claim under the appropriate appellate standard as dictated by this Court in *Batson v. Kentucky* and *Hernandez v. New York*, the prosecutor's race-neutral explanations undoubtedly would have been held sufficient. The Court of Appeals, by adding some sort of "rationality" test so it could *de novo* measure the sufficiency of the State's proffered explanations, incorrectly went in search of the "rational prosecutor" and as a result applied a more stringent standard than that required by equal protection principles.

For these reasons, a writ of certiorari should issue so that this Court may review the decision below. The misinterpretation of *Batson v. Kentucky* and *Hernandez v. New York* seems so clear that

a summary disposition may be appropriate.

Respectfully submitted,

TIM CURRY
District Attorney
Tarrant County, Texas

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Assistant District Attorney
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APPENDIX

COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

JESUS MARTINEZ — APPELLANT

V. — NO. 2-91-142-CR

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 3
OF TARRANT COUNTY

OPINION

Jesus Martinez appeals his conviction by a jury for the offense of driving while intoxicated. The court assessed his punishment at ninety days in the Tarrant County jail, probated for twenty-four months, and a fine of $300.00. Martinez contends in two points of error that the trial court erred in overruling his objection to two of the State's peremptory challenges because the challenges were racially discriminatory as prohibited by TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).

We reverse the judgment and remand for trial because the prosecutor's first explanation for striking a Hispanic veniremember was not a legitimate one, and because the record reflects that any determination by the trial court that the prosecutor's stated reasons were not a pretext, but that her strikes were exercised for race-neutral reasons, was clearly erroneous.

Martinez contends in point of error number one that the trial court erred by overruling his objection, based upon article 35.261 of the Texas Code of Criminal Procedure, to the State's use of a peremptory challenge against a Hispanic venireman. Without making a finding that Martinez had made a prima facie case of

discrimination based upon race, the trial court asked for a response from the prosecutor, who stated that she struck the juror because of his attitudes toward intoxication and his views on the validity of an intoxilyzer test.

During voir dire, counsel for Martinez explained to the members of the venire that mere drinking prior to driving did not constitute a crime unless the blood alcohol content was raised to a certain level or that one lost the normal use of one's physical or mental faculties. He then asked the Hispanic veniremember, "So I guess Mr. Hernandez, does that make sense to you that you can have a drink or several drinks, get in a car and drive and not commit a crime?" Mr. Hernandez responded, "Yes, I understand what you're saying."

As we previously indicated, the prosecutor also stated that she struck the Hispanic veniremember because of his views on the validity of the intoxilyzer test. Our record does not reflect that the Hispanic veniremember expressed any views on the validity of the intoxilyzer test. The record does show that an unidentified member of the venire stated that his cousin, who was a police officer in Dallas, told him that he believed more in the blood test than the breathalyzer test. However, that member of the panel was not asked about his views of the intoxilyzer test.

We must determine whether the trial court's ruling overruling Martinez's motion brought in accordance with article 35.261 of the Texas Code of Criminal Procedure was clearly erroneous. Williams v. State, 804 S.W.2d 95, 101 (Tex. Crim. App.), cert. denied, 111 S.Ct. 2875 (1991). Although we believe that it is preferable to do so, the trial court did not make findings of fact and conclusions of law at the conclusion of the proceeding regarding article 35.261. We will assume, for the purposes of this discussion, that the trial court found the reasons stated by the prosecutor to be credible and not a pretext, thereby determining that she did not exercise this peremptory strike on the bases of race. Since the trial judge's finding in this type of proceeding usually turns on an

evaluation of credibility, we will ordinarily give the findings great deference. Id. at 106, quoting United States v. Mathews, 803 F.2d 325, 330 (7th Cir. 1986).

As part of our analysis of whether the trial court's findings are clearly erroneous, we may consider whether the findings are supported by the record. Williams, 804 S.W.2d at 101.

We may also consider certain factors, the presence of any one of which tends to show that the State's reasons are not actually supported by the record or are an impermissible pretext. These factors are:

> 1. The reason given for the peremptory challenge is not related to the facts of the case;
>
> 2. there was a lack of questioning to the challenged juror or a lack of meaningful questions;
>
> 3. Disparate treatment - persons with the same or similar characteristics as the challenged juror were not struck;
>
> 4. Disparate examination of members of the venire, i.e., questioning a challenged juror so as to evoke a certain response without asking the same question of other panel members; and
>
> 5. an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.

Williams v. State, 804 S.W.2d at 106; Whitsey v. State, 796 S.W.2d 707, 713-14 (Tex. Crim. App. 1989).

We also note that the prosecutor's reason must be a "legitimate reason." Batson v. Kentucky, 476 U.S. 79, 99 n. 20,

106 S.Ct. 1712, 1724 n.20, 90 L.Ed.2d 69 (1986); Whitsey, 796 S.W.2d at 713. We understand this to mean that it must be a nonracial reason that a rational prosecutor might in good faith wish to use as a peremptory challenge.

As we have noted, the prosecutor first stated that she wished to challenge the Hispanic veniremember because of his views on intoxication. The only views expressed by the veniremember in effect were that the D.W.I. law made sense and he understood it. We do not consider that a peremptory challenge based upon a juror's response to the effect that he understands or agrees with the applicable law in the case is a legitimate reason for peremptory challenge as required by Batson and article 35.261 of the Texas Code of Criminal Procedure. Additionally, we may presume that the non-Hispanic jurors who were not challenged also understood and were in agreement with the D.W.I. law. We would also point out that the State did not ask the venireman any questions concerning his views about intoxication.

Also, as we have noted, the prosecutor told the court that she struck the veniremember because of his opinion on the validity of the intoxilyzer test. The record reflects that the veniremember never expressed an opinion as to the validity of the intoxilyzer test. On this appeal, the State refers us to an unidentified member of the venire who related that his cousin, a Dallas police officer, told him that he believed more in the blood test than the intoxilyzer test. However, even the unidentified member of the venire was not asked, nor did he testify, concerning his opinion as to the validity of the intoxilyzer test.

We note that nothing the Hispanic veniremember said about intoxication or the intoxilyzer test, even if we conclude that the Hispanic veniremember was the unidentified veniremember in the record who testified concerning his cousin's view of the intoxilyzer, would suggest that the veniremember was hostile to the State. See Hill v. State, No. 347-90, slip op. at 16 (Tex. Crim. App. January 8, 1992) (reh'g pending). Although the opinion in

Hill is not yet final, we agree with the reasoning expressed therein. Given the facts before us and the nature of the prosecutor's explanation, we hold that the trial court's implied conclusion that the peremptory challenge was not a pretext but was exercised for race-neutral reasons is clearly erroneous, because it is not supported by the record.

In a supplemental brief, the State contends that the prosecutor may have determined the veniremember's attitude and views by means of the way in which the veniremember answered the voir dire questions. It urges that the trial court was able to observe the demeanor of the veniremember when making its ruling on Martinez's objection. Consequently, the State argues, the trial judge had two possible inferences to make and we must give deference to the trial court's choice.

When the prosecution relies on the veniremember's attitude or demeanor, and the record of the voir dire reflects no hostility toward the State, the prosecutor's stated reason for the strike must specifically state the body language or nonverbal actions that led the prosecutor to believe that the venireman is biased against the State. Id. In Hill, the prosecutor stated as part of the reason that he was striking the veniremember that he did not like the way he responded to his questions, and he did not like his attitude or his demeanor. The court held that the prosecutor's reason was pretextual because the State had not stated specifically the body language or nonverbal action that showed hostility toward the State, and because the State's limited questioning of the veniremember revealed no hostility toward the State. Id. In the case at bar, the prosecutor made no reference to demeanor at all, much less state specifically the body language or nonverbal action that she might have been relying on in making the strike. Also, as in Hill, the prosecutor's limited questioning showed no hostility toward the State.

The State relies on Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859, 1871-72, 114 L.Ed.2d 395, 413-14 (1991). We

note that in Hernandez the prosecutor stated his reason for striking certain Hispanic or Latino veniremembers very specifically, giving in detail the body language or nonverbal action that he relied upon. As we have noted, the prosecutor in this case did not even indicate that there was a problem with the veniremember's demeanor. We sustain point of error number one.

Martinez urges in point of error number two that the trial court erred by overruling his objection under article 35.261 to the State's peremptory challenge of a black veniremember.

In the face of Martinez's objection, the prosecutor stated that she struck this venireman because of his responsiveness to her voir dire, the answers that he had to defense counsel's questions, and the possibility of a criminal record.

The record reflects that the State did not ask any questions of the black veniremember at all, except those questions that the State asked the panel as a whole. The State again refers us to the voir dire questions asked of certain unidentified members of the venire. We have examined the testimony of those anonymous members of the venire and find that nothing that any of them said would constitute any basis for a peremptory challenge. In response to questions asked by defense counsel, the venireman testified that he worked for an executive security firm as a guard for a private residence.

The record reflects that the veniremember, in his juror information sheet, indicated that either he, a member of his family, or close friend, had been charged with a crime. Martinez does not argue, nor does the record reflect, that nonminority veniremembers who answered this question affirmatively were not struck. We further note that individual voir dire questioning by both the State and the defense was very limited. We hold that, considering the entire record, the trial court's implied findings and its overruling of Martinez's motion under article 35.261 as to this venireman were not clearly erroneous. We overrule point of error number two.

We reverse the judgment and remand for trial.

JOHN G. HILL
JUSTICE

PANEL B
HILL, MEYERS, AND DAY, JJ.
PUBLISH

FEB. 05 1992

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

JESUS MARTINEZ No. 0337-92

VS.

THE STATE OF TEXAS (COA#: 02-91-00142-CR)

Delivered May 20, 1992

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

JESUS MARTINEZ No. 0337-92

VS.

THE STATE OF TEXAS (COA#: 02-91-00142-CR)

Delivered September 23, 1992

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

JESUS MARTINEZ

VS. NO. 0337-92

THE STATE OF TEXAS

STATE'S PETITION FOR REVIEW

[Excerpts]

TO THE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

In the event this petition is granted, the State believes oral argument would be helpful because the determination of proper appellate review of a trial court's Batson ruling is very important to the criminal jurisprudence of this state.

STATEMENT OF THE CASE

A jury convicted Appellant of driving while intoxicated (R. I-20, III-235). Punishment was assessed by the court at ninety days in jail and a $300 fine, with the jail time probated for two years (R. I-21, III-238). The Court of Appeals reversed and remanded the case for a new trial on the ground that the prosecutor's explanation for her strike of an Hispanic venireman was not a legitimate reason and that the trial court's determination that her strike was exercised for a race-neutral reason was clearly erroneous.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion on February 5, 1992. The opinion, written by Justice Hill, was ordered **published**. No motion for rehearing was filed.

QUESTIONS FOR REVIEW

1. Whether the Court of Appeals applied the "clearly erroneous" standard of review to the trial judge's Batson[1] ruling by determining whether that ruling was supported by the most favorable review of the evidence, or whether the court actually turned that standard on its head by viewing the evidence in the light least favorable to the ruling to see if the record could be construed in a way to undermine the judge's ruling (R. II-47, 49, 60-61).

2. Whether the Court of Appeals' holding that a legitimate reason for a State's strike must be "a nonracial reason that a rational prosecutor might in good faith wish to use as a peremptory challenge" conflicts with Hernandez v. New York by expanding appellate review beyond the determination of whether the strike was race-neutral (R. II-47, 49, 60-61).

3. Whether the Court of Appeals erred in requiring the prosecutor to point out non-verbal actions by the venireman even though the prosecutor did not cite demeanor as an explanation for her strike (R. II-47, 49, 60-61).

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[1] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

[State's petition for review, pp. 1, 2.]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

JESUS MARTINEZ,	§	
APPELLANT	§	NO. 337-92
	§	
V.	§	
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

STATE'S MOTION FOR REHEARING FOLLOWING REFUSAL OF ITS PETITION FOR REVIEW

TO THE COURT OF CRIMINAL APPEALS:

GROUNDS FOR REHEARING

1. The Court of Appeals' requirement that a prosecutor's reason for striking a minority juror be not only non-racial in fact, but also rational, conflicts with Batson v. Kentucky, as interpreted by this Court s recent decision in Draughon v. State, #69,863 (Tex. Crim. App. May 13, 1992).

2. Even if the prosecutor's strike had to be rational, the Court of Appeals' conclusion that it was not conflicts with this Court's recent decision on analogous facts in Harris v. State, #70,167 (Tex. Crim. App. Apr. 22, 1992).

QUESTIONS FOR REVIEW ONE AND TWO (RESTATED)

1. Whether the Court of Appeals applied Hernandez v. New York's " clearly erroneous" standard of review to the trial judge's Batson ruling, or whether the court actually turned that standard on its head by viewing the record in the light least favorable to the trial judge's decision that there had been no discrimination.

2. Whether the Court of Appeals' holding that the justification for a State's strike must be "a nonracial reason that a ***rational*** prosecutor might in good faith wish to use" involves a requirement not imposed by Batson v. Kentucky and Hernandez v. New York.[1]

DISCUSSION

I. The factual record and the opinion below

This appeal turned on whether the prosecutor struck prospective juror Hernandez for non-racial reasons. The prosecutor said she struck Mr. Hernandez " . . . for some of his attitudes towards intoxication and more specifically his views on the validity of an intoxilyzer test." R. II -- 61. The defense offered ***no*** evidence or argument to challenge the prosecutor's explanations. R. II--61.

Venireman Hernandez entered the picture after the defense attorney gave a lengthy hypothetical stressing that a person was not necessarily guilty of DWI even though he had consumed many alcoholic drinks:

MR. LOLLAR [defense counsel]: . . . .

. . . . how many of you here think that it is a crime to drink an alcoholic beverage or beverages and then get into a car and drive that vehicle after you have consumed alcoholic beverages:

THE VENIREMEN: (Hands raised.)

You got one, two, three, four. What I want to do is tell you that that is not a crime. You can drink one drink, ten drinks or

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[1] The State does not waive the third question in its original petition, but we here set out only the first two questions because they are the ones most directly affected by the intervening circumstances to which the motion must be confined.

twenty drinks and get in the car and drive, depending obviously on the time frame, the absorption rate of alcohol, depending on whether you're intoxicated.

I guess DWI is a good crime -- what I call a crime of degree. You may have one drink, you might have ten drinks, depending on the time period and not commit a crime by driving an automobile after that. Okay? Only if you drink enough during a given time period to raise your blood alcohol content to a level of intoxication or so that you lose or so that you don't have the normal use of your physical or mental faculties. Only then has the crime occurred.

So I guess Mr. Hernandez, does that make sense to you that you can have a drink or several drinks, get in a car and drive and not commit a crime?

THE VENIREMAN: Yes, I understand what you're saying.

R. II -- 46-47.

Later in the voir dire, defense counsel interrogated the panel about any independent knowledge they had of the intoxilyzer:

> MR. LOLLAR [Defense counsel]: . . . . I think the state asked you, do any of you have any independent knowledge of the intoxilyzer machine, used one, taken one, had your buddies tell you about one, had your cousin, the police officer in Dallas tell you about it?
>
> THE VENIREMAN: Oh, yeah, all the time.[2]
>
> MR. LOLLAR: Does he believe in them?
>
> THE VENIREMAN: He says he believes more in the blood test than breathalizer test.
>
> R. II - - 49.

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[2] His police officer/cousin was first mentioned at R. II -28.

The Court of Appeals acknowledged that the trial judge ". . . found the reasons stated by the prosecutor to be credible and not a pretext . . . ." Slip opin. at 3; Martinez v. State, 824 S.W.2d 724, 726 (Tex. App. -- Fort Worth 1992). Nevertheless, it held the trial judge's credibility determination to be clearly erroneous. The Court of Appeals prefaced its discussion with the observation that Batson v. Kentucky, 106 S.Ct. 1712 (1986), requires that the prosecutor's reason for the strike be "legitimate," adding that:

> We understand this to mean that [the explanation] must be a nonracial reason that a ***rational*** prosecutor might in good faith wish to use as a peremptory challenge.
> Slip opin. at 4; 824 S.W.2d at 726 (emphasis added).

The court went on to say that Mr. Hernandez's "general views" on intoxication (the first passage set out above) constituted only a statement that he understood and agreed with the DWI law, and thus an irrational reason for the State to want to strike him. Slip opin. at 5; 824 S.W.2d at 726. The court also said Mr. Hernandez never gave ***his own*** views on the validity of the intoxilyzer but merely stated that his cousin, a police officer, found blood tests more reliable. Thus, it found the prosecutor's reliance on Mr. Hernandez's "own" suspicion of breath tests to be an irrational and unsupported explanation under Batson. Slip opin. at 5-6; 824 S.W.2d at 726-27.

II. The legal argument

The Court of Appeals was wrong on two counts. First, the prosecutor's explanations were eminently rational, viewing the record in the light most favorable to the trial judge's ruling. Second, even if irrational or unwise, they were nevertheless

facially non-racial and were accepted as non-racial in fact by the trial judge, which is all that is required by Batson and Hernandez v. New York, 111 S.Ct. 1859 (1991).

A. The prosecutor's strikes were both rational and non-racial

This Court recently upheld an explanation for striking a minority juror where the prosecutor noted that the juror's brother was on a felony probation. The Court recognized that "[i]mplicit in such reason is, of course, the reasonable notion that such a venireperson might be biased against the prosecution." Harris v. State, #70,167 (Tex. Crim. App. Apr. 22, 1992) (slip opin. at 3 & n.3).

The Fort Worth Court of Appeals overlooked "reasonable notions" that were similarly implicit in Mr. Hernandez's answers and the prosecutor's explanations.

First, when a defense attorney spends almost a page telling the jury panel that a person could imbibe 10 or 20 drinks and still not be DWI and then gets a "Yes, I understand" when he asks if that makes sense to Mr. Hernandez, a prosecutor is not irrational in thinking that answer might indicate a bit more than a mere understanding of and agreement with the DWI law. It is entirely reasonable for the prosecutor to fear that the juror might now tend toward the view that the person was ***necessarily*** not intoxicated in such circumstances. This was a simple case of a prosecutor striking a juror for fear that skillful defense voir dire had planted a seed of doubt about the State's case in the juror's mind.

Second, when Mr. Hernandez noted his police officer/cousin's preference for blood tests rather than breath tests, it was entirely rational for the prosecutor to fear that the answer ***implicitly*** indicated the possibility of a similar bias by Mr. Hernandez against breath tests (the type of test the prosecutor would be relying on in this case: R. III - 132, 167). Common experience teaches that people are influenced by the views of their

friends and relatives, but the Court of Appeals refuses to acknowledge that idea. In effect, the Court of Appeals penalized the prosecutor because her explanation was not as precise and fully spelled out as might have been possible. However, neither Batson, Harris v. State, nor common sense imposes such a requirement. As Harris makes clear, the courts should look at the underlying rationale that can be inferred from the prosecutor's explanations and the venireman s responses.[3]

B. The prosecutor's strikes were non-racial, even if irrational

More disturbing in the long run is the Court of Appeals' statement that a permissible explanation for a strike must, under Batson, be one which a "rational prosecutor" could rely on.

Hernandez v. New York makes clear that Batson requires **only** that the explanation be non-racial in fact; it does not require that the decision to strike the juror be a wise or rational one. Hernandez v. New York, 111 S.Ct. at 1866. While the rationality of the strikes may be a factor for the trial judge to consider (just as disparate impact is a factor), the rationality of the strike is not part of the ultimate Batson test, nor may it be converted into such by

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[3] The Court of Appeals noted that Mr. Hernandez was not specifically identified in the record as the prospective juror who mentioned that his cousin, the police officer, preferred the validity of blood tests rather than breath tests, though the court ultimately addressed the prosecutor's explantions by assuming that he was that juror. Slip opin. at 5; 824 S.W.2d at 726. It is true that the statement of facts refers only to "THE VENIREMAN" when this response was given. R. II -- 49. However, there can be no question but that this was Mr. Hernandez.

When the prosecutor said her strike was based in part on Mr. Hernandez's "views on the validity of an intoxilyzer test," defense counsel stood silent as the trial judge denied his Batson motion. R. II -- 61. Since defense counsel would have been quick to point out any factual inaccuracy in the prosecutor's statement, his silence is the best evidence that Mr. Hernandez is the one who stated the cousin's preference for blood tests, especially since that is the only time in the voir dire anyone expressed any possible dissatisfaction with the breath test. Moreover, normal standards of appellate review would require that any competing inferences be resolved in favor of the trial judge's ruling.

the way an appellate court conducts its review. Hernandez v. New York, 111 S.Ct. at 1871-72. Indeed, the Supreme Court declined to address whether the New York prosecutor's decision to strike bilingual jurors was a "wise" decision; it was enough that the trial judge had concluded that strikes based on such reasons were not racially motivated. Hernandez v. New York, Ill S.Ct. at 1872.

Similarly, this Court said only a few weeks ago that a prosecutor's strikes are permissible under Batson, even though based on "idiosyncratic reasons," as long as they are not racially motivated. Draughon v. State, #69,863 (Tex. Crim. App. May 13, 1992)(slip opin. at 2).

Conceivably the prosecutor's decision to strike Mr. Hernandez was unwise, irrational, or idiosyncratic. Maybe a more experienced prosecutor would have interpreted his responses differently or would have preferred some clarification of Mr. Hernandez's answers. But the venireman's remarks came during defense voir dire when the State had no opportunity for further questioning. The prosecutor had to draw the best conclusions she could from what she heard. Her explanation is facially non-racial, it was believed by the trial judge, and there are statements from Mr. Hernandez to which the prosecutor's explanations relate, even if one thinks differing inferences could have been drawn from those statements. Batson v. Kentucky and Hernandez v. New York mandate that the judge's decision be upheld in such a situation. Hernandez v. New York, 111 S.Ct. at 1871-72.

C. Summary

Thus, the Court of Appeals added to the substantive requirements of Batson with its "rationality" test. The lower court effectively engaged in a de novo review of the record by drawing all inferences against the State and the trial judge, despite mouthing adherence to the "clearly erroneous" standard.

The Court of Appeals also ignored facts favorable to the State. For example, the Court of Appeals did not mention that the State's main witness was an Hispanic police officer (Officer Soto, R. III -- 54-55), which tended to negate any reason to discriminate against Hispanics. See Hernandez v. New York, 111 S.Ct. at 1872. Nor did the court mention that the prosecutor manifested a lack of discriminatory intent by initiating an inquiry into whether any of the venire would be prejudiced against Appellant because he spoke only Spanish. R. II -- 15. The court also ignored that Appellant, not the State, struck another juror who possibly was Hispanic. (Prospective juror Pinzon, R. I -- 6; II -- 60). Perhaps, most important, the court gave no weight to defense counsel's total failure to challenge the prosecutor's explanations. He sought to ask no questions; he offered no evidence; he did not even assert that the explanations were false or otherwise inadequate. He simply said "thank you," when the trial judge accepted the prosecutor's explanation. R. II -- 61.

The Court of Appeals should have recognized the Batson challenge for what it was: a pro forma objection for the record without any belief that it should be sustained. However, the Court of Appeals turned the case into a monster by not only mangling the law, but also unfairly branding both a prosecutor and a trial judge as racists.

III. This decision should be reviewed on its merits, but at a minimum a dissenting opinion should be published in order to facilitate review by the U.S. Supreme Court

This is a **published** opinion which cries out for review. If five judges are unwilling to vote for review at this point, the State fervently prays that one or more judges will see fit to issue a published opinion dissenting to the refusal of review. If the State cannot receive relief in this Court, it desires to take the case to the

U.S. Supreme Court. However, the Court of Appeals' opinion is written in such a fashion that the cert-worthiness of the legal issues may be overshadowed by the very fact that the lower court summarized the record in the light least favorable to the State. A strong, published dissent would clarify the issues.

PRAYER

The petition for review should be granted on rehearing and the judgment of the lower court reversed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a copy of this motion for rehearing has been mailed to Appellant's attorneys, Gary Medlin, 201 Main St., Suite 600, Fort Worth, TX 76102, and Frank Coffey, 1220 N. Main, Suite 300, Ft. Worth, TX 76106, and to Robert Huttash, State Prosecuting Attorney, P.O. Box 12405, Austin, TX 78711, on June 3, 1992.

C. CHRIS MARSHALL

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COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

Jesus Martinez	§	
vs.	§	No. 2-91-142-CR
The State of Texas	§	

ORDER

On this day came on to be considered the state's motion for stay of mandate.

The motion is **GRANTED**. The mandate is hereby stayed until disposition of a petition for writ of certiorari by the Supreme Court of the United States.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record and the trial court clerk.

It is so ordered.

SIGNED THIS 5th day of November, 1992.

JOHN G. HILL
ADMINISTRATIVE JUSTICE